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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

PETER TODD, an individual,

Plaintiff,

v.

ISIS AGORA LOVECRUFT, an individual,

Defendant.

Case No. 4:19-cv-01751-DMR

**PLAINTIFF PETER TODD'S REPLY TO
DEFENDANT'S SUPPLEMENTAL
BRIEF IN SUPPORT OF DEFENDANT'S
SPECIAL MOTION TO STRIKE
PLAINTIFF'S COMPLAINT (ANTI-
SLAPP MOTION)**

Complaint Filed: April 3, 2019

1 Plaintiff Peter Todd, by and through counsel, hereby submits his Reply to
 2 Defendant's Supplemental Brief in Support of Special Motion to Strike Plaintiff's
 3 Complaint (Anti-SLAPP Motion).

4 **A. While the standards for summary judgment and anti-SLAPP are similar, anti-**
 5 **SLAPP imposes a less onerous burden on a plaintiff than Rule 56.**

6 In their brief, Defendant argues that the second prong of anti-SLAPP "is
 7 functionally the same as the standard under Rule 56(a), such that the outcome should be
 8 the same regardless which standard the Court applies." (Def.'s Supp. Br. at 8:4–5.)
 9 Defendant provides no support for their argument. Moreover, Defendant's argument is
 10 contradicted by the case law, which has set forth two different standards.

11 Under the second prong of anti-SLAPP, the plaintiff must show a "reasonable
 12 probability" of prevailing on its claims for those claims to survive dismissal. See *Mindys*
 13 *Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 598 (9th Cir. 2010); *Chaquico v. Freiberg*, No.
 14 17-CV-02423-MEJ, 2018 WL 3368733, at *3 (N.D. Cal. July 10, 2018) (applying *Mindys*
 15 *Cosmetics, Inc.*'s anti-SLAPP analysis after *Planned Parenthood*). "Reasonable
 16 probability" in the anti-SLAPP statute has a specialized meaning, requiring only minimal
 17 merit, even after the court accepts as true all evidence and inferences favorable to the
 18 plaintiff. See *Tensor Law P.C. v. Rubin*, No. 2:18-CV-01490-SVW-SK, 2019 WL 3249595,
 19 at *4 (C.D. Cal. Apr. 10, 2019),

20 By comparison, where the party opposing summary judgment bears the burden of
 21 proof at trial, that party must, through their own affidavits and other evidence, identify
 22 specific facts showing that there is a genuine issue for trial. See *Celotex Corp. v. Catrett*,
 23 477 U.S. 317, 324 (1986). A genuine issue for trial exists when the opposing party submits
 24 evidence from which a rational juror could draw reasonable inferences about material
 25 facts that are necessary elements of the opposing party's claim. See *Triton Energy Corp.*
 26 *v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995).

27 Thus, the showing required by a plaintiff to defeat an anti-SLAPP motion based on
 28 a factual challenge is similar to, though different from, the plaintiff's burden in opposing

summary judgment under Rule 56. *See Vangheluwe v. Got News, LLC*, 365 F. Supp. 3d 836, 844 (E.D. Mich. 2019) (“Yet the anti-SLAPP statute introduces a third standard: ‘reasonable probability.’”). More specifically, because the purpose of anti-SLAPP is to allow early dismissal of meritless claims aimed at chilling expression, and because anti-SLAPP provides a more severe remedy than summary judgment under Rule 56 (allowing a prevailing defendant to recover their costs and fees), anti-SLAPP only requires a plaintiff to establish minimal merit as opposed to a genuine issue for trial. *See Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 839 (9th Cir. 2001) (identifying legislative purpose of anti-SLAPP).

Despite the foregoing, Plaintiff has submitted sufficient evidence to overcome Defendant’s motion under either standard.

B. Defendant incorrectly argues that the Court can decide the issue of malice without referring the issue to the jury.

In their brief, Defendant argues that whether a plaintiff has made a sufficient prima facie showing of malice in a defamation claim is ultimately a question of law. Defendant is correct that “[t]he question of whether evidence in the record is sufficient to support a finding of actual malice is one of law.” *Kaelin v. Globe Commc’ns Corp.*, 162 F.3d 1036, 1039 (9th Cir. 1998). However, at summary judgment, the Court must only ask whether a reasonable juror could find that the defendant acted with actual malice. *See id.* If so, the jury must determine whether the defendant acted with actual malice—not the court. *See* Judicial Council of California Civil Jury Instruction 1700; *see also Crane v. Arizona Republic*, 972 F.2d 1511, 1517 (9th Cir. 1992) (“Whether the evidence in the record is sufficient to permit the question of actual malice to go to a jury is a question of law that we review de novo.”). Defendant’s brief creates the incorrect impression that the Court can decide the issue of malice even when a reasonable juror could find either way.

Moreover, regarding the issue of whether the plaintiff is a limited-purpose public figure, the Court can only decide that issue on summary judgment if no issue of material fact exists. Otherwise, the Court should decide the issue after a trial or evidentiary

1 hearing. See *Abghari v. Gonzales*, 596 F. Supp. 2d 1336, 1343 (C.D. Cal. 2009) (district
2 court may resolve a pure question of law on summary judgment without bench trial or
3 evidentiary hearing).

4 **CONCLUSION**

5 For the reasons set forth in Plaintiff's opposition to Defendant's anti-SLAPP motion
6 and in Plaintiff's supplemental briefing, the Court should deny Defendant's anti-SLAPP
7 motion.

8
9 Respectfully Submitted,

10 DATED: September 19, 2019

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